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IN THE

Supreme Court of the United States

October Term, 1946.

No. 1226.

TEXASTEEL MANUFACTURING COMPANY, GEORGE W. ARMSTRONG, SR., ALLEN J. ARMSTRONG, GEORGE W. ARMSTRONG, JR., and MARY C. ARMSTRONG,
Petitioners,

v.

SEABOARD SURETY COMPANY,
Respondent.

No. 1227.

GEORGE W. ARMSTRONG, SR., MARY C. ARMSTRONG, ALLEN J. ARMSTRONG and GEORGE W. ARMSTRONG, JR.,
Petitioners,

v.

SEABOARD SURETY COMPANY,
Respondent.

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Respondent.

No. 1227.

George W. Armstrong, Sr., Mary C. Armstrong, Allen J. Armstrong, and George W. Armstrong, Jr.,

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v.

Seaboard Surety Company,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR SEABOARD SURETY COMPANY IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI.

Opinion Below.

Opinion of the Circuit Court of Appeals, Fifth Circuit, is reported at 158 F. 2nd 90.[1]

Jurisdiction.

The judgment of the Circuit Court of Appeals in both cases was entered on December 6, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Paragraph 347).

Questions Presented.

1. Is jurisdiction conferred upon the District Court by the Federal Declaratory Judgment Act where controversies exist between a surety and its indemnitors as to liability on indemnity agreements and on promissory notes; where indemnitors assert liability against the surety for continuing losses from manufacturing operations being sustained daily by the surety's principal; and where the surety was being called upon to extend additional credits in behalf of its principal in order that the principal might perform its contracts?

(Affirmed by the Circuit Court.)

2. Did the District Court have jurisdiction to entertain proceedings for a declaratory judgment between a surety and its corporate principal which appeared and joined in the prayer for an adjudication of the controversies, while the corporation was in reorganization under Chapter X?

(Affirmed by the Circuit Court.)

3. Did the Trial Court err in its holding that there was no evidence on factual issues for a jury?

(Negatived by the Circuit Court.)

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[1] The Opinion and Judgment of the District Court of the United States for the Northern District of Texas is at R. 147.

4. Did the District Court have jurisdiction to grant further relief by entering monetary judgments based upon a prior declaratory judgment where a petition for such further relief was filed prior to the taking of an appeal from the declaratory judgment?

(Affirmed by the Circuit Court.)

5. Were monetary judgments against the individual petitioners entered in disregard of Texas law dealing with the rights of parties secondarily liable, where petitioners had agreed that all signers and endorsers on a promissory note were to be regarded as principals, and where the individuals were primarily liable for the same obligation under a separate indemnity agreement?

(Negatived by the Circuit Court.)

Statement.

Suit was brought by the respondent on December 9, 1944 for a declaration of rights and liabilities on the various substantial controversies between the parties (R. 29, 2, 75, 91, 112, 128, 134).[2] Trial resulted in a directed verdict on March 8, 1945 in favor of the respondent (R. 138, 1009). Judgment was entered on May 2, 1945 (R. 147). On July 30, 1945, the petitioners filed an appeal (2 R. 37).

On July 19, 1945, the respondent filed a petition for further relief, based upon the declaratory judgment, seeking monetary judgments (2 R. 2, 28-31). After hearing on August 20, 1945, judgments totalling $623,906.25 were entered for the respondent on January 12, 1946 against the petitioners George W. Armstrong, Allen J Armstrong and George W. Armstrong, Jr., but execution was stayed during the pendency of appeal (2 R. 108). No monetary judg-

[2] "R" refers to Transcript of Record filed in the Circuit Court of Appeals, No. 11499; "2 R" refers to the Transcript of Record, No. 11603.

ment was entered against Texasteel Manufacturing Company [3] (2 R. 123). Petitioners filed an appeal on February 2, 1946 (2 R. 123).

By stipulation and by order of the Circuit Court of Appeals, the two appeals were argued together. On December 6, 1946, the judgments of the District Court in both appeals were affirmed. The questions presented by the two applications for certiorari arise out of the same subject matter, and the respondent is therefore filing the same brief in both cases.

In the summer of 1941, the petitioner Texasteel entered into three contracts with the U. S. Navy Bureau of Ordnance [4] to manufacture 364,000 five-inch shells and 20,000 six-inch shells for an aggregate price of $4,837,191.00, and procured from the Navy Bureau advance payments of $585,844.00 on two of the contracts (R. 183, 198, 209, 640, 641). Deliveries were to commence in January, 1942, and were to be substantially completed by July, 1942 (R. 638). In the fall of 1941, Texasteel, being in need of facilities for manufacturing the shells, entered into a facilities contract with the Navy Bureau whereby Texasteel obtained $550,000.00 from the Navy Bureau for that purpose (R. 816).

Respondent, as surety, and Texasteel, as principal, furnished to the Navy Bureau bonds for the performance of these various contracts (R. 195, 201, 211, 489) and for the repayment of the advance payments (R. 192, 204, 489). Petitioners, George W. Armstrong, George W. Armstrong, Jr., Allen J. Armstrong and Mary C. Armstrong owned all the stock of Texasteel. They executed agreements to indemnify respondent against all liability, loss, costs, damages and expenses resulting from its furnishing of the various bonds (R. 189-191, 198, 200, 243, 180, 217).

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[3] "Texasteel" is used throughout to designate "Texasteel Manufacturing Company".

[4] "Navy Bureau" is used throughout to designate "U. S. Navy Bureau of Ordnance".

Respondent's first notice of trouble came when, on February 10, 1942, the Navy Bureau wrote it that Texasteel's ability to perform its shell contracts was in serious question and that deliveries under one of the contracts were already in default (R. 650).

Additional facilities were needed at Port Arthur before shells could be produced, for, as became apparent by February, 1942, only about one-third of the needed shell making machinery had been included in the petitioners' original plan. To cure this deficiency, the petitioners, in late March, 1942, requested additional funds from the Navy Bureau, and submitted on April 1, 1942, new plans and specifications in which the itemized cost of the required additional machinery was placed at $880,000.00 (R. 684, 334, 335).

The Navy Bureau launched an inquiry. Between April 3, 1942—when (at a Bureau conference attended by Allen J. Armstrong and George W. Armstrong) Commander Hagen expressed emphatic belief that Texasteel could not properly manage the project and recommended refusal of additional facilities and removal of existing facilities (R. 921)—and June 2, 1942, it sent three investigators, including its chief engineer, to Port Arthur and received adverse reports from each as to the Texasteel management (R. 935-940, 922-924, 925-933).

In the last of these reports, the inspector recommended that the requested facilities be allowed, "provided that George W. Armstrong, Sr., Allen J. Armstrong and John Foster be removed from any office or position they hold" (R. 932). George W. Armstrong, Sr., and Allen J. Armstrong, petitioners, were Board Chairman and President of Texasteel. John Foster was Financial Officer for its Port Arthur operations.

On the day that this report was received, Admiral W. H. P. Blandy, Bureau Chief, summoned T. V. O'Neill, a representative of respondent, before the members of the Navy Bureau at Washington, and informed him that addi-

tional funds for facilities would be granted to Texasteel only in the event that George W. Armstrong, Sr., Allen J. Armstrong and John Foster sever their connection with the Navy shell making operations of Texasteel. He requested O'Neill to go to Texas and inform the petitioners of the Bureau's position (R. 220-222). O'Neill replied that he did not consider such step necessary, but if such was the Navy Bureau's requirement, it should evidence it with a letter (R. 221). Admiral Blandy wrote, and delivered to O'Neill, such a letter (R. 225-226).

When O'Neill informed petitioners Allen J. Armstrong and George W. Armstrong of the Navy Bureau's demand, they flatly refused to resign (R. 228, 798). The petitioners then conferred with their attorney, and adopted company resolutions drafted by him, providing that Port Arthur management would be placed in the hands of a management committee consisting of George W. Armstrong, Jr., and T. V. O'Neill, to act for and on behalf of Texasteel (R. 666, 65-66, 69, 230-231). The Navy Bureau was prevailed upon to forego its condition precedent to granting further funds, and to accept, in its stead, the petitioners' counter proposal (R. 898, 230, 235-237). On July 8, 1942, the Navy Bureau made available to Texasteel approximately $927,000.00 to be used to purchase the additional shell making facilities (R. 851, 816).

Texasteel's management committee, under the direction and supervision of its Board of Directors (R. 847-71, 876, 883), proceeded from the date of its appointment in June 1942, to acquire and install machinery, obtain raw materials, hire labor, and to prepare generally to make shells under the Navy contracts. Not until June, 1943, two years after the making of the contracts and one year after the company had originally obligated itself to complete them, was production begun, and then on a very limited scale (R. 283).

On November 30, 1943, all three shell contracts being materially in default, the Navy Bureau indicated that unless

increased production was shown by February, 1944 (within 60 days), the shell contracts would be canceled for nonperformance (R. 431). Provisions were contained in each contract which authorized the Navy, upon default in performance, to buy shells of a similar character upon the outside market (Art. 5 of Shell Contracts, R. 183, 198, 209), or to cause the contracts to be performed by third-party shell makers (R. 183, 198, 209), all damages or added costs accruing, to be assessed against Texasteel and the respondent surety (R. 183, 198, 209). In the final analysis, the respondent surety would have recourse against the petitioners upon their indemnities (R. 217).

Texasteel's operating capital being exhausted, the petitioners again turned to the respondent for assistance. On the strength of the petitioners' promissory note, supported by their company's resolutions and by stock pledges previously given by the petitioners to the respondent, and now made available by the respondent for the petitioners' pressing need, and supported also by the respondent's additional suretyship, for which the petitioners executed a new indemnity agreement, Continental National Bank of Fort Worth loaned $350,000.00 on December 8, 1943 (R. 498, 322-332, 504-508, 513-514, 515-516, 517, 520). Texasteel received the loan proceeds (R. 388).

In March, 1944, the petitioners again borrowed from Continental National Bank to obtain additional working capital for Texasteel. This time, loan funds amounting to $200,000.00, obtained on the petitioners' promissory notes, supported by the stock pledges and by the respondent's additional suretyship, for which the petitioners executed new indemnity agreements, were made available to Texasteel (R. 500, 502, 501, 503, 496, 494, 518, 867).

Shell production, though improved, still lagged far behind contract requirements, and the Navy Bureau on June 28, 1944, sent Texasteel a cancellation notice on one of the three shell contracts, for default in performance (R. 341).

Texasteel, as principal, and the respondent, as surety, on July 6, 1944, jointly wrote the Navy Bureau, requesting withdrawal of the cancellation notice and urging recognition of Texasteel's need for the lightening of amortization provisions whereby 40¢ of each shell payment dollar was being withheld by the Navy Bureau and applied to repayment of advance payments, inasmuch as it had become apparent that shells could not be made with the fractional (60%) payments which Texasteel was receiving (R. 344-350).

On July 29, 1944, following a Navy Bureau hearing attended by representatives of the petitioners and the respondent, the Navy Bureau indicated that it would withdraw the notice and grant a moratorium in amortization payments, provided that Texasteel would maintain a scheduled rate of production, and that Texasteel and the respondent, as surety, would reaffirm the bond obligations (R. 465-470).

Petitioners refused to reaffirm the bond obligations, and charged, in letters to respondent and others, that the respondent, and not Texasteel, nor themselves as indemnitors, was liable for Texasteel's operating losses (R. 367, 368, 369, 472).

By August 18, 1944, a stalemate had been reached, and the parties mutually agreed upon the filing, on that day, of a petition for the reorganization of Texasteel, and upon the appointment of a Trustee (R. 453-454). The Trustee took over the operations of Texasteel under the Court's direction, and was authorized to sell, from time to time, Trustee's Certificates to obtain funds to continue the contract performance at Port Arthur (R. 144-145).

The Trustee found no market for selling certificates except with the aid of the respondent's guaranty to the purchaser (R. 382). Between August 18, 1944 and February 26, 1945 (when the respondent's suit for declaratory judgment came to trial), the respondent furnished its guaranty

to the purchaser of certificates in the aggregate sum of $515,000.00 to procure for the Trustee an equivalent amount of funds for operating capital necessary to the performance of Texasteel's Navy shell contracts (R. 379).

Following the Trustee's appointment on August 18, 1944, the petitioners supplemented their claims of financial immunity for Port Arthur losses with damage claims and claims of fraud and duress against the respondent (R. 8-9, 477, 418, 370-373, 382, 120-130).

The $200,000.00 Continental National Bank notes became due on September 1, 1944 (2 R. 64-65), and on December 11, 1944, no payment having been made, the bank demanded payment from the Trustee and from the petitioners (R. 311). The $350,000.00 note was a demand note (R. 498), and payment having been refused (R. 311), the bank in early January, 1945 made demand on the respondent to honor its guaranty. Respondent complied on January 8, 1945 by paying the bank $550,000.00, with interest (R. 312), and took assignments of the notes and pledges securing them (2 R. 77, 314).

On December 9, 1944, the respondent filed its petition for a declaration of the rights and liabilities in controversy (2 R. 3) at a time when operating losses were continuing and additional guarantees on Trustee's Certificates were being required.

Texasteel, answering by its Trustee, and George W. Armstrong, Sr. and his wife, Mary C. Armstrong (joint owners of 80% of Texasteel stock) joined in the respondent's request for a declaration of correlative rights and liabilities of the parties (R. 94-95, 133-134). No motion to dismiss was filed by either of them (R. 94, 133). The Trustee, seeking affirmative monetary relief, asked the Court to declare the petitioners' notes, bonds and indemnities void; that the respondent be adjudged liable for Texasteel's operational losses and expenses, and for damages against the respondent approximating $1,000,000.00 (R. 91-95). The

answer of the petitioners, George W. Armstrong, Sr. and wife, majority stockholders, was of similar general import (R. 2-9).

At the time of bringing suit, the aggregate amount of suretyship which the respondent had furnished Texasteel, in reliance upon the indemnifications of the petitioners, was approximately $2,880,000.00 (R. 376).

Argument.

I. A declaratory judgment was a proper remedy in this case where petitioners denied liability on certain notes held by respondent and on their agreements to indemnify respondent; where they asserted that respondent was liable for the losses which had resulted from the manufacturing operations of petitioner Texasteel and which were being sustained during the subsequent Trusteeship; and where respondent was being called upon to guarantee additional Trustee's certificates in order that the Trustee might continue performance of the contracts.

In seeking to raise a question within Supreme Court Rule 38, 5, (b), the petitioners assert that the decision of the Circuit Court is in conflict with the decision in *Angell v. Schram,* 109 Fed. 2nd 380 (Sixth Circuit, 1940).[5] They cite the *Angell* case for the proposition that a declaratory judgment is not appropriate where the rights of the parties have become fixed.

There is nothing in that decision to that effect, but if there were, it would not affect us here. When the respondent's petition for a declaratory judgment was filed, the parties' rights and liabilities had not been fixed, nor will they become so finally until this ligitation is concluded. Petitioners' liability upon the bank notes, as is conclusively shown by their Petition and Supporting Brief, has not been fixed to their satisfaction, nor do they recognize that the respondent's non-liability to them was fixed by the declaratory decree and its affirmance by the Circuit Court of Appeals. In *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 81 L. Ed. 617 (1937), the dispute which this Court held to be appropriate for declaratory judgment was described in these words:

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[5] Petitioners' Brief, Cause No. 1226, p. 22.

> "It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts" (p. 242).

The suggestion of the petitioners[6] that declaratory judgment proceedings will not lie where there is another adequate remedy is directly contrary to the Federal Rules of Civil Procedure which have been approved by this Court. Rule 57 provides:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. . . ."

The other objection of the petitioners to the use of this remedy is that the issues have become moot.[7] The best proof that the issues remain alive is that this matter is being contested to the highest Court in the country.

Before and after the start of reorganization proceedings, the petitioners charged that the respondent had dominated and controlled the Port Arthur operations of Texasteel from 1942 forward, and that it was liable for all losses sustained in performance of the shell contracts (R. 369, 471). Since that time they have made numerous charges with respect to the rights and liabilities between the respondent and the petitioners. They have denied any liability on the various indemnity agreements (R. 367-368-369, 472). They have asserted the invalidity of the stock escrow agreements (R. 9, 120, 477-478). They have denied any liability arising out of the $550,000.00 in notes (R. 477-478). They have charged the respondent with fraud and misrepresentations (R. 120). They have asserted that the respondent instigated the proceedings for the reorganization of Texasteel for the purpose of obtaining control of that company's assets and that the respondent procured

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[6] Petitioners' Brief, Cause No. 1226, pp. 56-57.
[7] Petitioner's Brief, Cause No. 1226, pp. 3-4.

the appointment of a disqualified trustee through whom it continued to dominate and control the Port Arthur operations (R. 124-125, 477-478). These various charges have been made from time to time since August, 1944 right up to the present time as appears from the Petitions for Certiorari.

Respondent was not required to remain in the state of uncertainty created by these numerous and oft repeated charges of the petitioners. Based upon the petitioners' assertions, every day's operation by the Trustee (and his operation was losing money) was being charged against the respondent. Nor could the respondent intelligently pass on the wisdom of guaranteeing additional Trustee's Certificates without knowing its rights under the previous indemnity agreements. Petitioners' claims were not limited to the Trustee's operational losses and expenses either, for their damage claim had then reached $2,000,000.00, and was increasing daily. Respondent therefore filed its Petition for the declaratory judgment.

The Trial Court recognized the propriety of the declaratory judgment proceedings in these words:

> ". . . In view of all of these controversies and threatened suits, in view of this further prospect, if the rights of these parties are not declared, that this defense plant was really going to be closed down. I know I have never had any declaratory suits where there was as much powerful and strong appeal, I should think far beyond the contemplation of this suit, for immediate declaration of the rights of these parties, and why it would not be to the interest of everybody. You have got these rights, of course they are not going to be determined by future happenings; they are determined by what has already happened, of course . . ." (R. 176).

Each one of the controversial issues is "appropriate for judicial determination". The controversies, here, are

certainly "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth,* supra. The propriety of a declaratory judgment in a situation where, as here, the moving party seeks, inter alia, a declaration of non-liability on claims asserted by the defending party, was clearly recognized in that opinion.

Petitioners' challenge of the propriety of declaratory relief in this case is completely unfounded in view of the controversial issues presented, the decisions of this Court typified by the *Aetna Life Insurance Company* case, supra, and the provisions of Rule 57 of the Federal Rules of Civil Procedure. No conflict between decisions exists. The Petions reveal no issue on this point requiring review by this Court.

II. The fact that Texasteel was in corporate reorganization under Chapter X of the Bankruptcy Act did not deprive the District Court of jurisdiction over the petition for declaratory judgment.

Petitioners contend that the instant decision conflicts with the Ninth Circuit's decision in *Moore v. Scott,* 55 Fed. 2nd 863 (Ninth Circuit, 1932), and with other decisions cited at pages 21 and 22 of their Brief in Cause No. 1226. They claim that conflict results from the entry of a declaratory judgment against Texasteel when that corporation was in reorganization proceedings.[8] Their statements therein are considered insufficient and inaccurate, and cause the submission of the following statement: Honorable James C. Wilson, Federal Judge, Northern District of Texas, Fort Worth Division, at the request of the attorneys for the petitioners and the respondent, appointed J. Mac. Thompson as Trustee of Texasteel in August, 1944 (R. 454). Subsequent thereto, the respondent, in December, 1944, filed suit

[8] Petitioners' Brief, Cause No. 1226, pp. 20-21.

for a declaration of the correlative rights and liabilities of the petitioners and the respondent (2 R. 3). This declaratory suit and the subsequent monetary proceeding were both tried before Judge James C. Wilson (R. 1; 2 R. 1). The Trustee (who was operating Texasteel under the direction and instruction of the appointing Court) sought by his Answer to augment assets of Texasteel by monetary recoveries against the respondent (R. 91-95). In his Answer, he requested and prayed for the cancellation of the $550,000.00 Continental Bank notes, the cancellation of all Texasteel indemnities, and for the recovery of damages against the respondent (R. 91-95).

The Trial Court refused to enter a monetary judgment against Texasteel, the pertinent part of its findings in that respect being: "I further conclude that inasmuch as Texasteel Manufacturing Company is involved in a bankruptcy proceeding in this court, no judgment should be rendered herein against said Texasteel Manufacturing Company or its Trustee . . ." (2 R. 123).

Petitioners urge that the decision of the Circuit Court is contrary to decisions in the other Circuits in holding that the District Court had jurisdiction over Texasteel for the purpose of these proceedings.[9] The decisions cited by the petitioners deal with "proceedings" in bankruptcy as distinguished from "controversies". Most of them are concerned with straight bankruptcy, and those dealing with corporate reorganization are not in point. These cases deal with situations where other than bankruptcy courts sought to administer or deplete the assets of bankrupt estates. They are, therefore, inapplicable to the present situation.

Section 116 (4), Article III, of Chapter X, 11 USCA 516 provides that, upon the approval of a petition, the judge *may*[10]

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[9] Petitioners' Brief, Cause No. 1226, p. 20.

[10] The italics used throughout this Brief are respondent's.

> "enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee . . ."

This section of Chapter X clearly recognizes that suits may be properly brought in other Courts against a corporation undergoing reorganization.

The power of another Court to entertain a suit against a corporation undergoing reorganization under the bankruptcy laws was clearly recognized by this Court in *Foust v. Munson Steamship Lines,* 299 U. S. 77, 81 L. Ed. 49 (1936). In that case an administrator brought an action in a State Court against the Steamship Lines under the Merchant Marine Act for the wrongful death of the decedent mariner. After a petition for reorganization of the Steamship Lines under 77B had been filed, the administrator petitioned the bankruptcy court for leave to continue the State Court Suit. This Court reversed the action of the Court below in denying leave to proceed, and said:

> "In reorganization proceedings neither the Act nor any rule of law entitles debtors or trustees as a matter of right to enjoin the trial of action such as that brought by petitioner. The court is to exercise the power conferred by subd. (c) (10) according to the particular circumstances of the case and is to be guided by considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate" (pp. 53-54).
>
> "There is nothing in the record to warrant a finding that liquidation of petitioner's claim by trial of his pending action at law would hinder, burden, delay or be at all inconsistent with the pending corporate reorganization proceeding under 77B" (p. 56).

Although the State Court suit involved in that decision had been instituted prior to the filing of the petition for

reorganization, this Court attached no significance to that fact in its reasoning and holding. The provisions of Section 77B (c) (10) referred to as the source of the power to stay are similar to those of Section 116 (4) of Chapter X quoted above. Both refer to "commencement" and "continuance" of suits.

It should be noted that the Trustee of Texasteel filed an Answer denying the allegations of the respondent's Petition for declaratory judgment (R. 91-95), and joined in requesting that "the liabilities and non-liabilities of this defendant (Texasteel) and the plaintiff (the respondent) be settled and adjusted . . ." (R. 94). The representative of the bankruptcy court has therefore affirmatively approved the commencement and continuation of this action.

The quoted provision of Chapter X and the decision of the Court on the application of the similar provision of 77B are a complete answer to the petitioners' contention in this regard. There is, therefore, no need for a review of this question by this Court.

III. The decision of the Court Below that there was no evidence for a jury on factual issues, properly applied the pertinent state and federal authorities.

The petitioners claim error in the Trial Court's refusal to submit an issue on duress.[11] Their claim is based on these facts: In March, 1942, the petitioners pledged their Texasteel stock with respondent as additional security for its suretyship obligations (R. 238). The pledge instrument authorized the respondent to vote the stock if the United States Government, or any branch thereof, should advise it that a change in management or policy of Texasteel was necessary in order to prevent the Government from declaring a default (R. 240). On June 6, 1942, the Navy Bureau, through its Chief, wrote the respondent that changes in

[11] Petitioners' Brief, Cause No. 1226, p. 22.

management personnel of Texasteel were a condition precedent to the granting of additional funds (R. 226). Shell contract NORD 150 was then five (5) months behind schedule. Deliveries, as contracted, were to be "2000 by January, 1942, and 2000 per month thereafter" (R. 199). No shells had then been manufactured. By deposition, the petitioner, Allen J. Armstrong, testified that after he had refused to resign from Texasteel's management, as was then demanded by the Navy Bureau, the respondent's agent said, "if he persisted in that adamant attitude that the Seaboard Surety Company might have to exercise its rights under the escrow agreement, and he never did say what they would do, but the inference was clear" (R. 665).

When this petitioner was upon the witness stand at the trial of the declaratory proceeding, he testified that the respondent "had the legal right to oust us from the corporation under the terms of the escrow agreement of March 28, which provided that in the event of notice from the Navy that a change in management or policy would be necessary to obviate default of the contract, the Seaboard Surety Company might take over the voting power of the stock of both the Texas Steel and the Texasteel Manufacturing Company. That right we did not question" (R. 666). The respondent in fact never exercised such rights.

The threat must be wrongful before duress results. The Texas case of *Ward v. Scarborough* (Commission of Appeals), 236 S. W. 434 (1922), upon which the petitioner relies for conflict states the following rule: "Duress of property cannot exist without there being a threat to do some act which the threatening party has no legal right to do . . . some illegal exaction or some fraud or deception" (p. 437). Had the Trial Court ruled differently, the decision would have conflicted with *Ward v. Scarborough*, supra.

The Trial Court found that the evidence wholly failed to raise any issue of fact triable by a jury (R. 146), and

therefore directed a verdict for the respondent. Petitioners assert that they were thereby denied their constitutional right to trial by jury.[12] However, a directed verdict involves no constitutional question where the evidence raises no issue of fact for a jury to determine. *Galloway v. U. S.*, 319 U. S. 372, 87 L. Ed. 1858 (1943).

Petitioners argue generally that the evidence presented Jury questions, and that the direction of a verdict was therefore not in accord with State and Federal decisions.[13] Actually, there was no failure to follow State or Federal decisions. There was simply a determination that there was no evidence for the jury on any factual issue. It is obvious that the petitioners are asking this Court to review all the evidence in the case and determine whether there was any evidence to go to a jury on any of these factual issues. This is not the type of question which Rule 38, 5, (b) contemplates. The District Court considered the evidence and found no issues of fact. The Circuit Court reviewed the evidence and affirmed this conclusion. There is no need for a third consideration of the facts by this Court.

Petitioners assert that the Court below improperly imposed upon them the burden of proving these facts.[14] The Trial Court found as follows:

> "The evidence did not raise any issue of fraud or duress, and did not raise any fact issue to make the plaintiff liable to the defendants, or to any of them. The evidence wholly failed to raise any fact issue triable to a jury." (R. 146)

Obviously, the Trial Court determined the issues on the evidence, irrespective of the burden of proof.

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[12] Petitioners' Brief, Cause No. 1226, p. 22.
[13] Petitioners' Brief, Cause No. 1226, pp. 23-26.
[14] Petitioners' Brief, Cause No. 1226, pp. 3, 24, 51.

IV. The appeal from the declaratory judgment did not prevent the District Court from granting further relief by entering monetary judgments against the individual petitioners.

The declaratory judgment was entered by the District Court on May 19, 1945 (R. 147). It declared the liability of Texasteel and the three Armstrong petitioners on the three notes totaling $550,000.00 and on the various indemnity agreements (R. 154-157). On July 19, 1945, based on this judgment, the respondent petitioned for money judgments against the three Armstrongs (2 R. 2), who thereafter on July 30, 1945, appealed to the Circuit Court from the declaratory judgment (2 R. 108). On January 12, 1946, the District Court entered monetary judgments in accordance with the prayer of the petition (2 R. 108).

Petitioners contend that the District Court did not have jurisdiction to enter these monetary judgments while the appeal from the declaratory judgments was pending.[15] No case cited by the petitioners so holds. Subdivision (2) of the Federal Declaratory Judgment Act authorizes the procedure of which the petitioners complain. It reads:

> "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith" (Title 28, Sec. 400, Judicial Code).

If the respondent had sought and obtained a monetary judgment with accompanying foreclosure at the time it commenced its declaratory proceedings on December 9, 1944, such action would have rendered even more precarious the

[15] Petitioners' Brief, Cause No. 1227, pp. 2-3, 7-11, 18, 21-22.

status of the shell contracts, and could have destroyed the petitioners' ownership in both Armstrong corporations. The respondent in paragraph 6 of its Petition for declaratory relief, summed up its position in these words:

> "And in this connection, the Court is informed that it has not here requested a monetary judgment against the defendants for the amounts owed by them upon said notes, nor has it requested a foreclosure of its lien and pledges, its desire being to continue to cooperate with the trustee in the performance of said contracts, to the end that the United States Navy may obtain the benefit of needed shells, and with the hope that, through such cooperation, the Port Arthur losses might be minimized, or wholly met, but in making the allegations immediately foregoing, the plaintiff, makes its position that its failure to here and now request a monetary judgment upon said notes and a foreclosure of its pledge and liens is without prejudice to its rights to such reliefs, either before or during trial of this case, by due amendment, or by subsequent request for further relief, in this, or in some other, Court, based upon any declaratory judgment or decree which may be granted by this Court, or by the exercise of any other remedy to recover a monetary judgment and a foreclosure, whether legal or equitable, which the said plaintiff might possess." (R. 48-49)

But on July 14, 1945, after the entry of the declaratory judgment, the reason for the respondent's refraining from requesting a monetary judgment with the accompanying foreclosure no longer prevailed, for, the war in Europe having ended, the Navy Bureau then exercised its right to terminate the shell contracts (2 R. 107).

Following such termination, the respondent on July 19, 1945, filed its Petition for further relief wherein it alleged that, the Navy Bureau having terminated the shell contracts on July 14th, "no reason exists for now denying

to the plaintiff coercive judgments against the defendants, jointly and severally, for the amounts owed upon the said notes, principal, interest and attorney's fees, with a foreclosure of the pledges securing the payments thereof'' (2 R. 8).

When this Petition for further relief was filed, the declaratory judgment had not been appealed from (2 R. 2, 37).

The Trial Court, upon the filing of the respondent's Petition for further relief, issued notice to the petitioners whose rights had been adjudicated by the declaration, to show cause on August 9, 1945, why the requested relief should not be granted forthwith (Court's Finding of Fact, 2 R. 116-117).

At the hearing which followed, the Court (in keeping with subdivision (2) of the Declaratory Judgment Act), stated that it considered it proper to grant the respondent's request for further relief, based upon the declaratory judgment, and that, in its opinion, the petitioners had failed to show cause why such relief should not be then granted (2 R. 38). The Court stated from the bench:

> ''It seems to me the proper time—I do not say that it is necessary—but the proper time for plaintiff to come in and ask for relief as provided for under the Act, and relief forthwith—in other words I do not see any reason why it should not be construed relief without any unreasonable delay, similar to the guarantee of a man when he indicated for a speedy trial, without any unreasonable delay. Of course any delay that is unnecessary in either instance would be an unreasonable delay, and it does not give any limit on existing circumstances or conditions. It says they may come in after they get their judgment, and they have that here, and cite the parties to show cause why that relief should not be given to them. Now I do not understand that the relief they are asking for here is

what you gentlemen representing the defendant seem to understand it to be.

I understand this relief that they are really calling for here, since the Court has decided these instruments valid, is simply for judgment on those instruments." (2 R. 38)

The liability established by the Court's earlier declaratory judgment was not vacated by the subsequent appeal therefrom, and the declarations therein decreed were admissable in evidence in the subsequent monetary suit, as proof of the prior adjudication of such facts. *Kansas Pacific Railway Company v. Twombly,* 100 U. S. 78, 25 L. Ed. 550 (1879); *Deposit Bank v. Frankfort,* 191 U. S. 499, 48 L. Ed. 276 (1903); *Butler v. Eaton,* 141 U. S. 240, 35 L. Ed. 713 (1891); *Dupont Company v. Richmond Company,* 297 Fed. 580 (Fourth Circuit, 1924).

The Trial Court followed to the letter the provisions of the Declaratory Judgment Act. Having determined that the petitioners had failed to show cause why further relief should not be granted forthwith, the Court entered the monetary judgments, the evidence having shown that it was proper to do so.

The petitioners do not assert that the Trial Court erroneously exercised a judicial discretion vested by the Statute in determining that it was proper to then enter the monetary judgments, but contend that the Court was without jurisdiction to do so. By reason of the express provisions of the Act, the petitioners' contention is without merit.

V. The entry of the monetary judgments was not in disregard of the Texas decisions and Texas statutes relied upon by the petitioners. Those authorities apply to parties whose liability is secondary.

The petitioners claim conflict between the Fifth Circuit's instant decision and the decision in *Wood v. Canfield Paper Company,* 117 Texas 399 (1928), 5 S. W. 748, by the Supreme Court of that state. The claim is that their liability to respondent upon the Continental National Bank notes is secondary, while that of Texasteel is primary, and that the decision in *Wood v. Canfield* precludes judgment against a party not primarily liable on a note or other contract, unless judgment be also rendered against the principal obligor.[16]

The following additional facts are submitted:

In December, 1943, Texasteel was financially unable to proceed with performance of its shell contracts (R. 416, 322, 323). The Continental National Bank of Fort Worth, upon being approached by the petitioners, was willing to lend Texasteel $350,000.00 upon condition that the petitioners, George W. Armstrong, Sr., Allen J. Armstrong, and George W. Armstrong, Jr., also obligate themselves upon the note. Another condition was that the respondent unconditionally guarantee payment thereof (R. 331).

The three Armstrong petitioners agreed to endorse it and did so, provision being contained in the body thereof that "all signers and endorsers are to be regarded as principals so far as their liability to payee is concerned" (R. 326).

Before the respondent delivered its guaranty to the lending bank, it obtained from each of the three Armstrong petitioners an agreement jointly and severally to indemnify it and hold it harmless "from and against any and all liability, damages, losses, costs, charges and expenses of

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[16] Petition, Cause No. 1227, pp. 11-13.

whatever kind or nature which the Surety shall or may, at any time, sustain or incur by reason or in consequence" of having executed the guaranty (2 R. 69-71). The financial statements of the individual petitioners subsequently received by the respondent showed their combined net worth as being $5,348,733.75 (R. 694-699).

In March, 1944, the petitioners again borrowed from the Continental National Bank to obtain additional working capital for Texasteel. On this occasion, loan funds amounted to $200,000.00 and were evidenced by two notes, each in the sum of $100,000.00. Texasteel was not a signer of either note. Petitioner, Allen J. Armstrong, signed one, and the petitioner, George W. Armstrong, Jr., signed the other. Petitioner George W. Armstrong, Sr., endorsed each note, which had on its face a provision similar to that contained in the $350,000.00 note that "all signers and endorsers are to be regarded as principals so far as their liability to payee is concerned" (R. 500, 502).

The respondent, before guaranteeing payment of these notes, received from the individual petitioners agreements of indemnity similar to that given to protect it from loss upon the $350,000.00 note (R. 494-496). The petitioners refused to pay the notes when requested by the bank (R. 311). The respondent paid them in keeping with the terms of its guaranties (R. 312), receiving assignments thereof from the bank (R. 314; 2 R. 77).

The respondent alleged in its pleadings that the Armstrongs are note principals (R. 46, 47, 50, 51, 55). The respondent further alleged that the petitioners' indemnities likewise cast primary liability upon them (2 R. 30, 34). The petitioners pleaded that they signed the notes as accommodation makers (R. 113). The Trial Court, in the trial of the declaratory suit, held that the liability of the Armstrongs and of Texasteel on the notes was that of primary obligors (R. 155-157), and in the monetary proceeding, entered judgment against the Armstrongs for the amounts due thereon (2 R. 110-111).

The individual petitioners contend error because a money judgment was not likewise entered against Texasteel.[17] There is, however, no Texas decision holding that judgment must be rendered against all primary obligors. *McDonald v. Cabiness,* 100 Tex. 615, 102 S. W. 721 (1907), and the many decisions following it, are authorities for the Circuit Court's decision that it was not necessary to sue or render a money judgment against the Armstrongs' co-principal, Texasteel. It was there said:

> "Under the rule in this state it is not indispensable to sue all the promissors on a joint promise. The plaintiff may sue one or more, or may dismiss as to one and proceed as to another, even in the appellate court. Miller v. Sullivan, 89 Tex. 480, 35 S. W. 362 and cases there cited. That decision has been followed and approved in the following cases: Bute v. Brainard, 93 Tex. 139, 53 S. W. 1017; and McFarlane v. Howell, 91 Tex. 221, 42 S. W. 853."

The case of *Wood v. Canfield Paper Company,* supra, relied upon by the petitioners as conflicting with the decision of the Circuit Court, deals with the rights of parties whose liability is secondary. That opinion applies the statutes[18] to the facts there involved. The holding is that no judgment should be rendered against a party whose liability is secondary, unless judgment be also rendered against the principal obligor, except where the principal obligor cannot be reached by the ordinary process of law, or his residence is unknown and cannot be ascertained with reasonable diligence, or where such principal obligor is insolvent.[19]

There is not only an absence of conflict between the decisions, but the Circuit Court's decision is correct and

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[17] Petition, Cause No. 1227, p. 11.
[18] Petitioners' Brief, Cause No. 1227, Appendix B.
[19] Texas Revised Statutes, Art. 1987.

is in strict conformity with those of the Texas Courts for the following reasons:

FIRST: The provision contained in all of the notes that "All signers and endorsers of this note are to be regarded as principals, so far as liability to payee is concerned", makes their status that which they agreed it would be, i. e., principals. *Ritter v. Hamilton,* 4 Texas 325 (1849); *Ennis, et al. v. Crump,* 6 Texas 85 (1851); *Jameson v. Officer,* 15 Texas Civ. App. 212, 39 S. W. 190 (1897); *Head v. Cleburne Bldg. & Loan Assn.,* 25 S. W. 810 (1893); *Moore v. Downie Bros. Circus* (Texas Civ. App.), 164 S. W. 2nd 420 (1942).

In the petitioners' attempts to explain this note provision, they have admitted that it made them principals, as applied to the payee, but claim that such relationship is limited to the payee. In their brief filed with the Circuit Court they state ". . . the judgment recited a provision of the note that, as to the payee, appellants would be principals. This provision is not applicable to appellee (respondent). It related only to payee, the Continental National Bank" (Appellants' Brief, Circuit Court, p. 13).

The petitioners claim that the quoted provision has no application to a purchaser from the original payee, is not the law. That provision is not limited to the designated payee in the note, but includes any person to whom the debt subsequently becomes payable. *Seastrunk et al. v. Pioneer Savings & Loan Co.,* 34 S. W. 466 (1896); *Thompson v. Findlater Hardware Co.,* 156 S. W. 301 (1913).

SECOND: The Texas Courts have also held that when a stockholder, officer or director of a corporation signs or endorses a note to enable the corporation to obtain funds for its use and benefit, such stockholder becomes liable as a principal debtor to the obligee. In so holding, the Dallas Court of Civil Appeals, in *Bank v. Goldstein, et al.,* 261 S. W. 538 (1924), said:

> ". . . Appellee was a stockholder in the L. Wenar Millinery Company, therefore was interested in the

> welfare of said company, and, to the extent of the stock held by him, owned an interest in its property. This interest was sufficient consideration to make him liable as a principal debtor in the execution of said note, although the proceeds were for the use and benefit of the L. Wenar Millinery Company, Reed v. Pueblo First National Bank, 23 Colo. 380, 48 Pac. 507, Vitkovitch v. Kleinecke, 33 Tex. Civ. App. 20, 75 S. W. 544 . . ."

To like effect are *Otto v. Republic National Company,* 173 S. W. (2nd) 234 (1943); *Commercial Inv. Co. v. Graves,* 132 S. W. (2nd) 439 (1939).

The individual petitioners owned all of Texasteel's outstanding stock, and admittedly signed and endorsed the notes for the benefit of their corporation.

THIRD: Finally and conclusively, the petitioners' joint and several liability as indemnitors, no less than their liability upon the notes, made them primary obligors. *Howell v. Commissioner,* 69 Fed. 2nd 447 (1934); *Eller v. Erwin,* 265 S. W. 595 (1924); *Olson, et al. v. Smith,* 72 S. W. 2nd 650 (1934); *U. S. F. & G. Company v. Bank of Hattiesburg,* 91 So. 344 (1922); *Abrahamson v. Burnett,* 157 Wash. 668, 290 Pac. 228 (at 229-230) (1930); *Bank v. Hanshaw,* 255 Ky. 825, 75 S. W. 2nd 529 (1934); 42 C. J. S. 612, Sec. 30.

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It is respectfully submitted that no one of the reasons advanced by the petitioners in support of their Petition is sound, and that there is no occasion for review by this Court of the decision of the Circuit Court of Appeals.

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